

similarly situated customers.<sup>61/</sup> The Commission may scrutinize refusals to provide roaming and unreasonable roaming actions that exhibit "any exercise of market power or engagement in other forms of anticompetitive conduct designed to raise rivals' costs and thwart competition, or to charge unjust or unreasonable prices for roaming service."<sup>62/</sup>

By making a finding that a CMRS licensee's roaming partner is sometimes also its competitor and further monitoring CMRS-to-CMRS roaming arrangements to deter anticompetitive refusals to provide roaming, the Commission will also facilitate the competitive development of a network of networks. The Commission should monitor roaming capability to enable all similarly situated CMRS licensees to obtain roaming agreements on a nondiscriminatory basis.<sup>63/</sup>

Comcast's concern is that a CMRS licensee's roaming partner, if a non-affiliated competitor, may use roaming as an anticompetitive tool. In particular, a carrier with affiliates in multiple markets may, in the absence of a rule, charge its affiliates little or nothing for roaming, but charge unreasonably high roaming rates to non-affiliated roamers. For example, in cellular and PCS markets a strong incentive exists for a wireline ("B side") carrier in one market, such as AT&T-McCaw, with multiple affiliated non-wireline ("A side")

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<sup>61/</sup> An individually negotiated service offering by a common carrier, although not licensed or tariffed, must still be offered on a nondiscriminatory basis to similarly situated customers. *See Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5902-03 (1991) ("*IXC Competition Order*") (the Commission upheld AT&T's offering of business service rates on a contract carriage, non-tariffed basis, if AT&T provides contract rates to all similarly situated customers on the same terms and conditions under Section 202(a)); *see also Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984) ("*Sea-Land*").

<sup>62/</sup> Notice, at ¶ 58.

<sup>63/</sup> *See* 47 U.S.C. § 202(a); *see also IXC Competition Order, Sea-Land* at note 61 *supra*.

carriers in adjacent markets to offer its affiliated A-side carriers discriminatorily low roaming rates in its "home," B-side market or charge unreasonably high roaming rates to customers of non-affiliated A-side carriers. This is not merely an unsubstantiated concern. Bell Atlantic charges a 10-cent-per-minute rate to customers of its cellular affiliate roaming in Connecticut, but charges Comcast's roamers 50-cents-per-minute.

A Commission policy that prevents roaming rate discrimination that unreasonably favors the customer or carrier of an affiliate of the carrier providing the roaming service is not only necessary, it is procompetitive. If a long distance or local exchange telephone company with market power has non-wireline cellular affiliates operating in multiple markets adjacent to its wireline affiliates' "home" markets, the roaming practices of the carrier must be circumscribed to ensure that the carrier is not using its market power in landline markets in which it is dominant to charge unreasonably high roaming rates to a non-affiliated roamers or unreasonably low rates to its affiliate roamers.<sup>64/</sup> This policy is procompetitive because it will prevent carriers, such as landline telephone companies with multiple CMRS affiliates, from leveraging their landline market power into CMRS markets to charge unreasonably discriminatory roaming rates.<sup>65/</sup>

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<sup>64/</sup> See, e.g., 47 C.F.R. § 22.901 (requires provision of roaming to all cellular subscribers in good standing).

<sup>65/</sup> See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); see also *Regulation of MCI Communications Corp./British Telecommunications, plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968-69 (1994) (Commission approved merger of British telephone monopoly with MCI on condition that MCI be subject to "special concessions" and reporting requirements to reflect potential for MCI to leverage British telephone monopoly's market power in its home market into United States market).

Appropriate network interface standards help to advance the establishment of seamless nationwide networks.<sup>66/</sup> Network interoperability among CMRS providers will facilitate roaming capability. It should be noted, moreover, that access to data-signalling is important and should not be used anticompetitively. If appropriate common interface standards are established, however, coupled with Commission monitoring of refusals to provide roaming, physical and direct interconnection will not be necessary and indeed may hinder the evolution of widespread roaming capability.<sup>67/</sup>

**V. CMRS PROVIDERS SHOULD NOT BE REQUIRED TO PROVIDE  
RESALE TO "SWITCH-BASED RESELLERS."**

The *Notice* tentatively concludes that the existing resale requirement imposed upon cellular providers be extended to apply to CMRS providers.<sup>68/</sup> The *Notice* further

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<sup>66/</sup> To establish interoperability between the existing network interface standard for cellular roaming (AMPS), which generally requires more spectrum than a digitized standard, and digital standards used for PCS, such as code or time division multiple access ("CDMA" or "TDMA" technology), will be challenging. The CMRS industry can meet that challenge. The Commission may facilitate the transition from analog to digital standards by implementing government-industry joint studies through its Office of Engineering and Technology. See, e.g., 47 C.F.R. § 22.933, reprinted in *Part 22 Rewrite*, 9 FCC Rcd at 6667 (requires cellular equipment compatibility with the "Cellular System Mobile Station-Land Station Compatibility Specifications (April 1981 Ed.), Office of Engineering and Technology Bulletin No. 53 in Report and Order, CC Docket No. 79-318, at Appendix D, 46 Fed. Reg. 27,655 (1981) ("*OET Bulletin No. 53*").

<sup>67/</sup> There is no legal or policy basis to impose a general interconnection obligation upon CMRS providers to achieve roaming. To impose an obligation to provide "physical or direct" interconnection just for the sake of achieving roaming capability would therefore impose undue and possibly unconstitutional regulatory burdens upon CMRS providers, where current Commission obligations coupled with appropriate interface standards provides a less restrictive means to advance competitive delivery of roaming services.

<sup>68/</sup> *Notice*, at ¶ 83.

tentatively concludes that requiring resale among CMRS providers will enhance competition with minimal costs for CMRS licensees.<sup>69/</sup> The Commission should adopt these tentative conclusions. In addition, the Commission should adopt its tentative conclusions that requiring CMRS providers to resell to fully operational facilities-based competitors and switch-based resellers is contrary to the public interest. Finally, the Commission must not allow switch-based resellers to extort interconnection from cellular licensees in complaints where the issues are more appropriately addressed and otherwise identical to the issues raised in this rulemaking.

**A. Resale Obligations Applicable to Cellular Licensees Should Be Extended to All CMRS Providers.**

The resale obligations currently applicable to cellular providers should be extended to all CMRS providers, as the *Notice* tentatively concludes. One of the primary goals of Congress in amending Section 332 is to ensure regulatory symmetry among all CMRS providers.<sup>70/</sup> To require cellular licensees to provide resale while allowing other similarly situated service providers to restrict resale would give such service providers an unfair competitive advantage. Thus, establishment of a resale requirement applicable to all CMRS providers is in the public interest.

The Commission generally defines "resale service" as an:

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<sup>69/</sup> *Notice*, at ¶¶ 84-5.

<sup>70/</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1417-19 (1994) ("*CMRS Second Report and Order*").

activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without "adding value") for profit.<sup>71/</sup>

In 1981, the Commission decided to prohibit cellular service providers from restricting resale of their services.<sup>72/</sup> Ten years later, the Commission reiterated that the requirement that there be no restrictions on resale of cellular service continue to apply with full force to the cellular industry, and that cellular licensees must make cellular service available to a reseller but only on the same terms and conditions made available to similarly situated resellers.<sup>73/</sup> In a number of cellular resale decisions, the Commission has held that the prohibition on restrictions on resale applies to conduct in which a carrier refuses to provide cellular service to a reseller on similar terms and conditions as those made available to similarly situated

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<sup>71/</sup> See *Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C.2d 261, 271 (1976), *modified on other grounds*, *Resale and Shared Use Reconsideration*, Memorandum Opinion and Order, 62 F.C.C.2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980); see also *CMRS Equal Access and Interconnection Notice*, 9 FCC Rcd at 5459 n.216.

<sup>72/</sup> *Cellular Communications Systems*, 86 F.C.C.2d at 510-11 (the Commission held that restrictions on resale of cellular service are contrary to the public interest and conditioned cellular licenses on not restricting resale of cellular service).

<sup>73/</sup> *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, CC Docket No. 91-33, 6 FCC Rcd 1719 (1991) (*Cellular Resale NPRM*), 7 FCC Rcd 4006 (1992) (*Cellular Resale Order*), *aff'd sub nom. Cellnet Communications v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992).

resellers, or refuses to provide volume discounts to the reseller that it makes available to similarly situated resellers.<sup>74/</sup>

To the extent that CMRS providers other than cellular licensees also provide, or will provide, services that are part of the "network of networks," applying a resale obligation to them will produce competitive benefits similar to those that have resulted in the cellular industry. For example, PCS, ESMR, and advanced common carrier paging deliver a service that should be available on similar terms and conditions to resellers. Accordingly, the Commission should adopt its tentative conclusion that a general resale obligation apply to all CMRS providers.

Furthermore, the Commission should adopt its tentative conclusion not to require CMRS providers to resell to fully operational facilities-based carriers. As the *Notice* correctly indicates, requiring an incumbent CMRS licensee to resell services to a new entrant is necessary to compensate for the "headstart" which the incumbent has already gained.<sup>75/</sup> However, when a facilities-based CMRS competitor is fully operational, the need to compensate for any "headstart" does not exist. In fact, to require a CMRS licensee to resell its services to a fully operational facilities-based competitor would only give the competitor a perverse incentive to "piggy-back" on the CMRS licensee's system.<sup>76/</sup> The maximum period

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<sup>74/</sup> See, e.g., *Continental Mobile Telephone Company, Inc., v. Chicago MSA Ltd.*, 7 FCC Rcd 2675 (Enforcement Div. 1992); *Cellnet Communications, Inc. v. Detroit SMSA Ltd.*, 9 FCC Rcd 3341, 3342 (Com. Car. Bur. 1994) ("*Cellnet*").

<sup>75/</sup> *Notice*, at ¶ 60.

<sup>76/</sup> See *Cellular Resale Order*, 7 FCC Rcd at 4008.

for any resale requirement addressing the "headstart" problem should, in all cases, be no more than three (3) years.

**B. Requiring CMRS Providers to Disaggregate Their Services Available for Resale By Switch-Based Resellers Conflicts with Existing Precedent and Is Not in the Public Interest.**

Requiring a CMRS provider to resell its services to a switch-based reseller would impose undue costs on CMRS licensees that outweigh any benefits that may derived from such an action. The Commission's existing cellular resale policies require that a cellular licensee make cellular service available to resellers but only on the same terms and conditions as made available to similarly situated resellers.<sup>77</sup>

The cellular resale requirement originated in the Commission's recognition of a need to offset any competitive "headstart" advantage one cellular carrier may have received because it was granted a construction permit prior to its competitor. As an exception to the general prohibition on resale restrictions, the Commission subsequently held that a cellular licensee would not be under an obligation to provide resale to its facilities-based competitor in the same market if that carrier was "fully operational."<sup>78</sup> The Commission decided that absent this exception to the resale requirement, its goals of establishing nationwide availability of a seamless cellular network would be impaired by letting carriers "piggy-back" on their

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<sup>77</sup>/ See, e.g., *Cellnet*, 9 FCC Rcd at 3342.

<sup>78</sup>/ Under the Commission's rules, a cellular licensee has five years from the date it receives a construction permit to "fill in" the market for which it has been licensed with the radio contours of its system (also called its cellular geographic service area ("CGSA")). A carrier is deemed to be "fully operational" after its five-year "fill-in" period has expired. See 47 C.F.R. § 22.911 printed in *Part 22 Rewrite*, 9 FCC Rcd at 6662.

competitor's system instead of building out their own systems and thereby promote efficient allocation of spectrum resources and interbrand competition.<sup>79/</sup>

Just as the Commission found it bad public policy to require cellular licensees to resell their services to fully operational facilities-based licensed competitors, requiring resale to switch-based resellers, who *declined* to participate in the Commission's Personal Communications Services ("PCS") auction, elected *not* to build their own systems, and thereby chose not to provide a spectrum-based service except by resale, would be even worse public policy.

To adopt the switch-based resale proposal would reward an entity for "piggy-backing" on the significant investments of the two cellular licensees in the market and place both those licensees at a competitive disadvantage.<sup>80/</sup> Requiring CMRS providers to make services available to switch-based resellers would similarly hinder the goals of establishing a

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<sup>79/</sup> See *Cellular Resale Order*, 7 FCC Rcd at 4008. For example, the Commission found that allowing cellular licensees to restrict resale of their services to fully-operational facilities-based competitors would eliminate the ability of a licensee to delay or decline construction in particular area within its CGSA and rely on its competitor's facilities instead. Without eliminating competitor resale, one carrier could convert to digital facilities, while its competitor simply piggy-backed on these investments through resale. *Id.* The exception to the resale requirement, which is codified at Section 22.901(e) of the Commission's rules, 47 C.F.R. § 22.901(e), provides:

Each cellular system licensee must permit unrestricted resale of its service, except that a licensee may apply resale restrictions to licensees of cellular systems on the other channel block in its market after the five year build-out period for licensees on the other channel block has expired.

Section 22.901(e) *reprinted in Part 22 Rewrite*, at 9 FCC Rcd at 6571 and 6660.

<sup>80/</sup> See *id.*

seamless wireless network by allowing a facilities-based, non-licensee reseller to "piggy-back" on the network and service investments of CMRS licensees.

**C. "Switch-Based Resale" Would Impose Large Costs on CMRS Licensees Without Resulting in Any Public Interest Benefits.**

The *Notice* seeks comments on whether requiring CMRS licensees to provide "switch-based resale" would impose undue costs upon CMRS licensees. The Commission seeks comment on what costs CMRS licensees would incur to "unbundle their services and offer interconnection on the terms needed for switch based resellers."<sup>81/</sup> Such a requirement would be unduly costly.

Most existing CMRS licensees, including PCS, cellular and enhanced SMR providers, have made substantial investments -- over \$1 billion in some markets -- in building out their wireless networks and deploying advanced wireless technologies, without switch-based resale.<sup>82/</sup> The Commission has found, for example, that cellular licensees have reinvested between 47 and 80 percent of their net income earned in new plant and equipment to expand capacity.<sup>83/</sup> Some ESMR providers have already ordered \$200 million in infrastructure.<sup>84/</sup> To comply with a "switch-based resale" requirement, CMRS licensees would have to dismantle their networks and surrender the large investment and equity in their services to entities have invested nothing and have neither been subject to the same public

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<sup>81/</sup> *Notice*, at ¶ 96.

<sup>82/</sup> *See, e.g., California Rate Regulation Order*, at ¶ 32-3 (winning bids for broadband PCS auctions in major markets in California ranging from \$34.14 million to \$493.5 million).

<sup>83/</sup> *See id.* at ¶¶ 137-39.

<sup>84/</sup> *See CMRS Third Report and Order*, 9 FCC Rcd at 8029 n.135.

interest obligations and conditions imposed on CMRS licensees nor built out their own networks. Further, allowing these entities to enter the marketplace in this fashion may discourage the deployment of existing cellular and new ESMR and PCS systems. Why should any license carrier invest hundreds of millions of dollars in their systems if a "reseller" of this system can purchase elements at wholesale never acquiring spectrum and under price on every occasion? The CMRS market is competitive and will become increasingly so. There is no need for the Commission to undermine entrepreneurial investment in telecommunications infrastructures for persons who want to be the same on the cheap.

**D. The Commission Cannot Allow Switch-Based Resellers to Abuse its Complaint Processes to Attempt to Extort Interconnection From Cellular Licensees.**

Referencing two formal complaints alleging "cellular licensees' refusal to permit interconnection" to "switch-based resellers," at footnote 197 of the *Notice*, the Commission states that it will "address these specific requests in the context of these complaint proceedings" and will not "prejudge" these proceedings.<sup>85/</sup> Yet, the effect of footnote 197 of the *Notice*, by inappropriately singling out Comcast and another cellular licensee to be subject to meritless complaints brought by "switch-based resellers" is to "prejudge" the issues.

At a minimum, the *Notice* prejudices the jurisdictional issues in these complaint proceedings by stating that the Commission intends to "address these specific requests in the

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<sup>85/</sup> See *Notice*, at ¶ 97 n.197 (citing *Cellnet Communications, Inc. v. New Par, Inc., d/b/a Cellular One*, File No. WB/ENF-F-95-010 (filed February 16, 1995); *Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc.*, File No. WB/ENF-F-95-011 (filed February 16, 1995)).

context of these complaint proceedings." The Commission cannot confer jurisdiction or give jurisdictional weight to issues in a complaint proceeding by referencing them in a footnote in a rulemaking proceeding.<sup>86/</sup>

One of the central purposes of the *Notice* is to seek comment on whether to establish a "switch-based reseller's right to unbundled interconnection" and impose a duty upon CMRS providers to make interconnection and resale available to switch-based resellers. To require Comcast individually to be subject to a formal complaint based on the issues to be determined in the *Notice* is an arbitrary and capricious exercise of the Commission's enforcement powers. Just as the Commission has done in the past, it should dismiss the switch-based resellers complaints and address any issues raised in the context of this proceeding.<sup>87/</sup>

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<sup>86/</sup> See, e.g., *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1353, 1361 (D.C. Cir. 1994) (Court found that Commission's pronouncement that it would accept cellular unserved areas applications in a footnote was unclear "even to a careful reader").

<sup>87/</sup> In 1988, the National Cellular Resellers Association ("NCRA") submitted a petition to broaden an ongoing rulemaking and an "emergency" petition for declaratory ruling seeking imposition of separate subsidiary and unbundled resale requirements upon cellular licensees and initiation of an inquiry into competition in cellular resale. The Commission denied these petitions and declined to make a declaratory ruling, but opened up consideration of the cellular resale issues NCRA raised in two separate Notices. See *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking, 6 FCC Rcd 1719, 1720-21 (1991), *aff'd sub nom. Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992); *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Notice of Proposed Rulemaking, 6 FCC Rcd 1732 (1991), *aff'd sub nom. National Cellular Resellers Ass'n v. FCC*, 961 F.2d 963 (D.C. Cir. 1992).

## **VI. CONCLUSION**

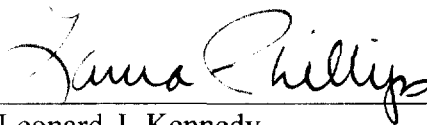
Comcast urges the Commission to design an interconnection regime that addresses the market power possessed by landline LECs through their wireless affiliates. Because CMRS providers lack market power, the Commission should adopt its tentative conclusion that no general interstate interconnection obligation should be imposed upon CMRS providers. The Commission should also recognize that, absent a hearing and public interest determination under Section 201(a) ordering physical interconnection, a CMRS provider is allowed to exercise its business judgment to decide whether to accept or refuse an interconnection request. To enforce formal complaints against CMRS providers for alleged interconnection violations is both arbitrary and capricious where there is no existing interconnection policy or rule.

The Commission should monitor whether roaming rates that a LEC or other entity with cellular affiliates in multiple markets are the product of leveraging market power in one market to charge unreasonably high rates to non-affiliated roamers or unreasonably low rates to affiliate roamers. To advance regulatory symmetry, the Commission should extend resale requirements applicable to cellular licensees to all CMRS providers. To the extent that CMRS providers other than cellular licensees also provide, or will provide, services that are part of the "network of networks," applying a resale obligation to them will produce competitive benefits similar to those that have resulted in the cellular industry.

The Commission should reject the "switch-based resale" proposal. The "switch-based resale" proposal would force existing CMRS licensees to surrender the significant investment and equity in their systems to a fully-operational competitor just because it calls

itself a "reseller." The Commission must not allow "switch-based resellers" to abuse its complaint processes to attempt to extort interconnection from cellular licensees where the issues raised in the complaints are more appropriately addressed and otherwise identical to the issues raised in this rulemaking. The *Notice* inappropriately singles out Comcast and another cellular licensee to be subject to meritless complaints filed by "switch-based resellers." The Commission should appropriately address the issues raised in those complaints in the context of this rulemaking.

Respectfully submitted,  
COMCAST CELLULAR COMMUNICATIONS, INC.

A handwritten signature in cursive script, appearing to read "Laura H. Phillips", is written over a horizontal line.

Leonard J. Kennedy  
Laura H. Phillips  
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